No. 73-1225

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MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1973

NATIONAL MARITIME UNION OF AMERICA,
AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-15a) is reported at 486 F. 2d 907. The Board's decision and order (Pet. App. 16a-24a), as amended (Pet. App. 46a-51a), are reported at 196 NLRB 1100.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on November 12, 1973. The petition for a writ of certiorari was filed on February 11, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly concluded that the union violated Section 8(e) of the National Labor Relations Act by maintaining and enforcing a contract clause providing that, if a ship is sold to a company not under contract with the union, it must carry with it a crew provided by the union and the seller must obtain a commitment from the purchaser to abide by the union's contract.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. 3-4.

STATEMENT

A. The Board's Findings of Fact

In 1969, Commerce Tankers Corporation ("Commerce"), which owned and operated two American flag oceangoing tankers, the *S.S. Thalia* and the *S.S. Barbara*, entered into a 3-year collective bargaining agreement with the National Maritime Union ("NMU") (A. 3-4; 38-40, 69, 128, 131).[1] Although Commerce was not a member of any multi-employer association for bargaining purposes, the contract which it signed was the same as contracts independently entered into by 48 different tanker companies belonging to the Tanker Service Committee, whose representative conducted pattern-setting negotiations with the NMU (A. 4; 131, 40-44, 50-53, 87-89, 104-105).

Pursuant to its contract with NMU, Commerce obtained the unlicensed seamen needed to man its ships

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[1] "A." refers to the appendix, and "S.A." to the supplemental appendix, filed in the court of appeals.

through the NMU hiring halls located in various ports (A. 44). Under the hiring hall system, seamen seeking work register with the hall for the jobs for which they are qualified, and the time of their registration is recorded. When employers call in job vacancies, these jobs are posted and then bid upon by the registrants who desire them.

Seamen using the NMU hall are divided into three different groups on the basis of their training and years of service on NMU contract vessels. Group I seamen, those with the most experience, are entitled to priority in being dispatched for available jobs. If no Group I seamen bid on a particular job, Group II and then Group III seamen have an opportunity to bid. Within any particular group, the job goes to the seaman longest out of work who is qualified and bids on the job. (A. 98-99.)

Jobs posted in the hiring hall are classified either as permanent, or relief, assignments. Permanent assignments, for which only Group I seamen are eligible, are indefinite in duration, so that a Group I seaman assigned to such a job may stay with the vessel for as long as he and his employer mutually desire. A permanent employee has the right not only to reship following the completion of any voyage, but also to take leaves of absence for holidays, illness, or other acceptable reasons, and, when he gives up his job, he is eligible for severance pay. (A. 118-121, 99-101, 44-45, 47-49.) If a permanent employee fails to reship on consecutive voyages and his absence is not authorized or otherwise excused, he loses his permanent status and his job goes back to the hiring hall for bidding (A. 121, 47-49). To get another job, the seaman must re-register with the hall; his priority then is below all those in his classification whose time stamp indicates that they have been out of work longer (A. 119, 98).

Commerce's contract with the NMU required that, if Commerce sold any of its ships to an American flag operator not already signatory to an NMU contract, the ship would be sold with a crew provided by the NMU and Commerce would obtain from the purchaser an undertaking that it would abide by all the terms and conditions of the NMU contract (A. 4, 18-19; 129). In December 1970, Commerce sold the *Thalia* to a company which, like Commerce, was signatory to the standard NMU tanker contract. The *Thalia* was then preparing to sail to India and its crew of permanent employees and temporary replacements was already signed on. At the time of the transfer of ownership, however, the NMU ordered the Commerce employees off the ship and posted the 29 permanent jobs for bidding in the hiring hall. Commerce's 29 permanent employees thus lost their rights to their jobs and were required to compete for new permanent assignments with the Group I seamen registered in the hall. (A. 44-46.)[2]

On December 23, 1970, shortly after the sale of the *S.S. Thalia,* Commerce agreed to sell its last remaining vessel, the *S.S. Barbara*, to Vantage Steamship Corporation, a New York corporation which operates American flag vessels known as "the Vantage group" in worldwide trade (A. 4; 55-56, 61-62). Vantage and its subsidiary corporations were members of the American Maritime Association, a multi-employer association whose employees were represented by the Seafarers International Union ("SIU"), and all the vessels in the Vantage fleet were covered by contracts with the SIU (A. 56-60). Vantage was not a signatory to NMU's standard tanker

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[2]The NMU conceded, before the Board, that the ship sale clause did not protect the particular individuals who were employed on the vessel at the time of transfer (A. 127).

agreement and Commerce's sales contract with Vantage made no provision for compliance with the NMU ship sale clause, which required that Commerce obtain an undertaking to honor the NMU agreement (A. 4; 62).

On January 11, 1971, after the NMU learned that Commerce was contemplating sale of the *S.S. Barbara,* it wrote Commerce and demanded to know what steps were being taken to assure compliance with the NMU ship sale clause (A. 129-130, 131-132). Although Commerce initially indicated that it foresaw no compliance problems (A. 130, 131-132), it subsequently advised the NMU that, on February 4, 1971, Vantage gave notice that it would be unable to recognize the NMU or give any undertaking to abide by the NMU's standard tanker agreement (A. 71-72). Commerce inquired whether the NMU would waive the ship sale clause, but the NMU refused (A. 72-74).

On February 6, 1971, Commerce advised Vantage that, unless it gave the undertaking required by the NMU ship sale clause, Commerce might be unable to transfer the *Barbara* (A. 5; 132). On February 8, Vantage responded that it stood ready, willing, and able to perform its part of its bargain with Commerce (which, as indicated, contained no requirement that Vantage comply with the NMU ship sale clause), and that it would hold Commerce accountable for the damages it would suffer if Commerce failed to perform its obligations (A. 133). On the same day, however, the NMU secured an arbitration award restraining Commerce from delivering the *Barbara* to Vantage or any other purchaser without complying with the ship transfer provisions of the NMU contract, and, on March 2, 1971, the United States District Court for the Southern District of New York confirmed this award and issued a

preliminary injunction. 325 F. Supp. 360. (A. 4-5, 11-12; 131-132, 145-151.)

Meanwhile, Vantage filed a charge with the Board alleging that both the NMU and Commerce were violating Section 8(e) of the Act (A. 5, 16; 1). The Board's Regional Director petitioned the district court, pursuant to Section 10(*l*) of the Act, for a preliminary injunction, which was denied. 329 F. Supp. 151. On appeal, the court below reversed both the denial of the 10(*l*) injunction and the earlier arbitration award. 457 F. 2d 1127.

B. The Decisions Below

The Board held that NMU and Commerce violated Section 8(e) of the Act by maintaining and enforcing the NMU ship sale clause so as to prevent Commerce from selling the *S.S. Barbara* to Vantage. The Board rejected the NMU's defense that the clause was lawful because it merely served to protect the jobs of the employees covered by the contract. The Board found that the clause did not protect the ship's permanent employees upon a sale, but instead preserved their jobs "for those other seamen who may be eligible for referral through the NMU hiring hall at the port out of which the new owner is to operate." The Board concluded that, in these circumstances, the clause placed "restrictions on sales which are not strictly 'germane to the economic integrity of the principal work unit'," and therefore it constituted restraint of a secondary employer (Pet. App. 50a-51a.) The Board ordered the NMU and Commerce to cease and desist from the unlawful conduct and to post appropriate notices (Pet. App. 21a-24a).[3]

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[3]Commerce has complied with this order and did not contest it in the court below.

The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. App. 3a-15a).

ARGUMENT

The decision of the court of appeals sustaining the Board's finding that the NMU's ship sale clause violated Section 8(e) of the Act, which generally prohibits a contract between a union and an employer requiring the latter not to do business with others, is correct and not in conflict with other decisions. No issue warranting review by this Court is presented.

1. In *National Woodwork Mfrs. Ass'n* v. *National Labor Relations Board*, 386 U.S. 612, 644, this Court held that whether an agreement restricting business relations with another violates Section 8(e) of the Act turns on whether, under all the surrounding circumstances, "the Union's objective was preservation of work for [the contracting employer's] employees," or "to satisfy union objectives elsewhere." If the agreement has the former objective, it is primary and lawful; if it has the latter objective, it is secondary and unlawful. Thus, "union standards" clauses which restrict subcontracting to those who observe certain pay scales and conditions of employment are reasonably calculated to prevent the transfer of unit work to competing employers with lower labor costs and, accordingly, have been treated as primary and lawful. See *Painters District Council 48* v. *National Labor Relations Board*, 328 F. 2d 534 (C.A.D.C.). On the other hand, "union signatory" clauses which permit the transfer of unit work to any employer so long as he is under a contract with the union have been treated as secondary and unlawful, since they represent an agreement to boycott other persons "for reasons not strictly germane to the eco-

nomic integrity of the principal work unit." *District 9, I.A.M.* v. *National Labor Relations Board*, 315 F. 2d 33, 36 (C.A.D.C.).

2. The Board and the court of appeals properly concluded that the NMU ship sale clause operated like a "union signatory" clause and thus violated Section 8(e). The clause on its face permits the sale of a ship to American purchasers only if they are signatories to a NMU contract. Moreover, as the NMU conceded before the Board (A. 127), in its practical operation the ship sale clause does nothing to protect the jobs of the seamen actually employed by the seller at the time of transfer. On the contrary, as shown *supra*, p. 4, when a ship is sold, the employees on board lose their jobs and the beneficiaries of the clause's operation are those other seamen, relative strangers to the seller and the ship, who may be referred to the new owner from the NMU's hiring halls. In any realistic sense, then, the NMU's ship sale clause does not preserve work for the employees of the boycotting employer, here Commerce, but, like a union signatory clause, only insures that the purchasing employer is under contract with the NMU and that the NMU membership as a whole does not suffer as a result of the transfer.[4]

Indeed, the record shows that the real reason for NMU's enforcement of its ship sale clause against Commerce was not to preserve unit work but to strike a blow

[4]The facts of this case are in marked contrast to those in *National Woodwork*, *supra*, where the clause at issue protected the current employees of the boycotting employer against the transfer of their work to anyone, including their fellow union members; thus, unlike the present case, the result of the clause's enforcement there was that the current employees continued to perform their traditional bargaining unit work (386 U.S. at 615-616, 644-646).

against its rival, the SIU. According to undisputed testimony (A. 155-156, n. 3; 75-77), Commerce, near the end of March 1971, asked the NMU for an exemption from the ship sale clause on the ground that, aside from Vantage, no other domestic companies were interested in purchasing the *Barbara*, and that thus, if the sale to Vantage did not go through, the ship would have to be sold to foreign operators. Pointing out that whether the ship was sold to Vantage, a SIU-contract operator, or to a foreign operator, the loss of the unit jobs was in any event inevitable, Commerce argued that there was no reason for the NMU to prevent the sale to Vantage. The NMU did not dispute Commerce's premise that the destruction of the Commerce bargaining unit was inevitable, but still insisted on its contract rights, stating that it would rather that the jobs "be lost foreign" than "be lost to the rival union SIU" (A. 77).

3. Noting that the Board assumed, without deciding, that the relevant bargaining unit "could include employees who may in the future be referred from NMU hiring halls to work on ships operated by Commerce" (Pet. App. 20a), the NMU contends that a clause protecting all seamen "eligible to seek employment through the NMU hiring halls" (Pet. 13)—some 21,000 in number (S.A. 1)—merely protects the bargaining unit, and thus is lawful (Pet. 13-17).[5] As the court below properly recognized (Pet. App. 15a), however, it would obliterate

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[5]In the proceedings below, the NMU initially argued that the relevant bargaining unit was a multi-employer unit which included not just the employees of Commerce, but also the employees of all the tanker companies under contract with the NMU. However, the Administrative Law Judge rejected this multi-employer unit contention (Pet. App. 37a-39a), and the NMU thereafter abandoned it.

the distinction between unit work preservation and union signatory clauses, and nullify the congressional purpose in enacting Section 8(e), to sanction protection where the unit is "many times larger than the actual work force of the primary employer and where the vast majority of the workers in the supposed unit have had no contact at all with the employer."

Finally, the NMU errs in asserting that the decision below holds that "the Union could seek job preservation *only* for those employees actually employed aboard a ship at the time of sale" (Pet. 9, italics in original), and in suggesting that the sole vice in the ship sale clause was that it benefited seamen eligible to seek employment, but not actually employed, by Commerce (Pet. 9, 15-16). A valid work preservation clause, of course, protects not only those persons who are actually employed by the employer, but it also has the incidental effect of benefiting laid-off employees who hope to return and those unknown persons who may be hired to work in the bargaining unit in the future. However, the NMU ship sale clause does nothing to prevent the actual employees of the boycotting employer from losing their jobs; hence the benefits which it secures to other union members—the merely prospective employees—are not "incidental," but the chief object of the clause.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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